Public Prosecutor v Goh Kim Keat

HIGH COURT (TAIPING) — CRIMINAL APPEAL NO 42–5 OF 2008
HASSAN AB RAHMAN JC
8 JULY 2009

Criminal Procedure — Sentence — Appeal against sentence — Factors to be considered — Public interest — Deterrent sentence — Whether accused's two year term of imprisonment ought to be enhanced

On 9 September 2001, Leow Choy Kim ('the victim') and her family had visited a religious institution in Taiping to meet Goh Kim Keat ('the accused'), who according to the victim and her family 'was a medium between men and God'. During that visit the accused committed an act of sexual intercourse which was against the order of nature against the victim. He was subsequently charged in the sessions court under s 377B of the Penal Code. The accused was found guilty of the offence, convicted and sentenced to two years' imprisonment from the date of conviction. The accused appealed against his conviction and sentence, while the prosecution being dissatisfied with the sentence imposed by the sessions' court judge ('the SCJ') lodged a cross-appeal against the sentence. On the hearing date the appellant withdrew his appeal but the prosecution proceeded with the cross-appeal. The prosecution submitted that the SCJ had failed to give sufficient consideration to the fact that the accused had misappropriated a religious institution for his own use and taken advantage of the trust confided in him by the victim's family. The prosecution further submitted that the sentence was not a deterrent signal to potential offenders and that it had failed to consider the trauma suffered by the victim. The court had to determine the issue as to whether, in the circumstances of the instant case, the accused's two year term of imprisonment ought to be enhanced.

Held, allowing the appeal:

(1) The imprisonment term of two years was inappropriate to the proven facts, crime scene and pre-planned manner of the offence committed by the accused. The condemned act was committed by the accused at the time when he was in charge at the religious institution, a place that should have been safe from such immoral conduct. Further the hope and trust confided in the accused by the victim and her family had been abused by the accused in a place they considered sacred (see para 7(a)).

(2) Public interest, which is a paramount consideration, was not given sufficient importance when the accused was only punished with a two

year term of imprisonment for an offence with the prescribed maximum sentence of 20 years imprisonment. Although the offence committed by the accused was not as rampant as certain other offences, the court should have considered a deterrent sentence to deter potential offenders emerging from this class of people who are highly entrusted in the society. As such, taking into consideration the same mitigating facts as considered by the SCJ a six year term of imprisonment is the most reasonable and appropriate sentence with the offence proved in this case (see para 7(e)–(h)).

(3) However, whatever aspect of public interest had been considered in this case, a whipping sentence still ought not to be imposed on the accused for the offence that he had committed (see para 7(h)).

[Bahasa Malaysia summary

Pada 9 September 2001, Leow Choy Kim ('mangsa') dan keluarganya telah pergi ke satu institusi agama di Taiping untuk bertemu Goh Kim Keat ('tertuduh'), yang menurut mangsa dan keluarganya 'adalah satu perantara antara manusia dan Tuhan'. Semasa lawatan tersebut tertuduh melakukan persetubuhan bertentangan dengan aturan tabii terhadap mangsa. Dia kemudiannya telah didakwa di mahkamah sesyen di bawah s 377B Kanun Keseksaan. Tertuduh didapati bersalah, disabitkan dan dijatuhkan hukuman penjara dua tahun dari tarikh sabitan. Tertuduh merayu terhadap sabitan dan hukumannya, sementara pihak pendakwaan yang tidak berpuas hati dengan hukuman yang dikenakan oleh hakim mahkamah sesyen ('HMS') mengemukakan rayuan balas terhadap hukuman tersebut. Pada tarikh perbicaraan perayu menarik balik rayuannya tetapi pihak pendakwaan meneruskan dengan rayuan balas. Pihak pendakwaan menghujah bahawa HMS telah gagal memberikan pertimbangan yang secukupnya terhadap fakta bahawa tertuduh telah menyalahgunakan institusi keagamaan untuk kegunaan diri sendiri dan mengambil kesempatan terhadap kepercayaan keluarga mangsa terhadapnya. Pihak pendakwaan seterusnya berhujah bahawa hukuman tersebut bukanlah satu isyarat mencegah kepada bakal pesalah-pesalah dan ia telah gagal untuk mempertimbangkan trauma yang dialami oleh mangsa. Mahkamah terpaksa memutuskan isu sama ada, dalam keadaan-keadaan kes ini, tempoh dua tahun penjara tertuduh sepatutnya ditambah.

Diputuskan, membenarkan rayuan:

(1) Tempoh penjara selama dua tahun tidak sesuai bagi fakta-fakta yang terbukti, tempat jenayah dan cara perancangan kesalahan dilakukan oleh tertuduh. Perbuatan yang terkutuk telah dilakukan oleh tertuduh pada masa dia bertanggungjawab terhadap sebuah institusi keagamaan, suatu tempat yang sepatutnya selamat dari kelakuan tidak bermoral seperti itu. Seterusnya harapan dan amanah yang berikan kepada tertuduh oleh

mangsa dan keluarganya telah disalahgunakan oleh tertuduh di tempat yang dianggap suci oleh mereka (lihat perenggan 7(a)).

(2) Kepentingan awam, yang merupakan satu pertimbangan utama, tidak diberi kepentingan yang mencukupi apabila tertuduh hanya dihukum dengan tempoh dua tahun penjara bagi satu kesalahan yang diperuntukkan dengan hukuman maksimum 20 tahun penjara. Walaupun kesalahan yang dilakukan oleh tertuduh tidak berleluasa seperti kesalahan-kesalahan tertentu yang lain, mahkamah sepatutnya mempertimbangkan satu hukuman pencegahan untuk menghalang bakal pesalah-pesalah yang muncul dari kelas orang seperti ini yang dipercayai oleh masyarakat. Oleh itu, mempertimbangkan fakta-fakta mitigasi yang sama seperti yang dipertimbangkan oleh HMS, tempoh enam tahun penjara ialah hukuman yang sesuai dan paling wajar bagi kesalahan yang dibuktikan dalam kes ini (lihat perenggan 7(e)–(h)).

(3) Walau bagaimanapun, apa-apa aspek kepentingan awam telah dipertimbangkan dalam kes ini, satu hukuman sebatan masih tidak sepatutnya dikenakan ke atas tertuduh bagi kesalahan yang telah dia lakukan (lihat perenggan 7(h)).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.

Cases referred to

Bhandulananda Jayatilake v PP [1982] MLJ 83, FC (refd)
Liow Chow & Anor v PP [1939] MLJ 170, HC (refd)
PP v Fam Kim Hock [1957] MLJ 20, HC (refd)
PP v Lim Guan Hock [1949] MLJ 231 (refd)

Legislation referred to

Penal Code s 377B

Naran Singh (Naran Singh & Co) for the plaintiff.
Jean Sharmila (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Hassan Ab Rahman JC:

[1] The respondent in this case ('the accused') was charged in the sessions court under s 377B of the Penal Code for having sexual intercourse against the order of nature by introducing his penis into the mouth of one girl by the name of Leow Choy Khim.

[2] The charge read as follows:

> Bahawa kamu pada 5.9.2001 di antara jam lebih kurang 10.00 malam hingga 11.00 malam di sebuah Tokong-Zhi Ong Ya Sien Shu, No. 241, Lorong 8, Pokok Assam, Taiping, di dalam Daerah Larut Matang di dalam Negeri Perak, telah melakukan persetubuhan di luar tabii terhadap seorang perempuan bernama Leow Chow Khim, KP: 851023-08-5760, iaitu dengan memasukkan kemaluan kamu ke dalam mulut penama. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan.

[3] The sessions court judge had found the accused guilty and convicted him on the charge after calling him for defence. The accused was sentenced to two years imprisonment commencing from the date of conviction ie 13 March 2008.

[4] The accused, at the first instance had lodged appeal against his conviction and sentence. The prosecution on the other hand, lodged a cross-appeal against the sentence.

[5] However, on the hearing date, the appellant's counsel withdrew the appeal but wished to proceed with his submission on the prosecution's cross-appeal who was dissatisfied with the sentence imposed by the learned sessions court judge on the following grounds:

(a) Had failed to give sufficient considerations that the accused had taken advantage of the trust confided in him by victim's family;

(b) Had failed to give enough consideration to the fact that the accused had misappropriated a religious institution for his own use;

(c) Had failed to give adequate concern to the plan arranged by the accused to perpetrate this crime;

(d) The sentence imposed is not a deterrent signal to potential offender;

(e) Had failed to give enough thought on the trauma experienced by the victim; and

(f) Had failed to take into account that whipping sentence can be imposed for this kind of case.

[6] Facts of this case are as follows:

> Pada malam kejadian iaitu antara pukul 10.00 hingga 11.00 malam (5.9.01) mangsa (SP1) bersama ibunya (SP6), kakaknya (SP3), adik dan anak saudaranya pergi ke Tokong-Zhi Ong Ya Sien Shu, di Pokok Assam, Taiping, bertujuan untuk menunaikan sembahyang dan doa selamat.

Tertuduh yang mereka kenali sebagai Chee Wong Yeh ialah seorang perantara (medium) yang bertugas di tokong itu mengendalikan ibadat sembahyang dan doa selamat.

Dalam kejadian itu, mangsa sekeluarga disuruh oleh Tertuduh bersembahyang dan berdoa dengan cara melulut. Kepala dan muka mereka ditutup dengan kertas yang besar sampai ke paras hidung. Mereka juga disuruh membakar 3 colok setiap orang. Mangsa sekeluarga diatur supaya melutut di tempat masing-masing sambil berdoa.

Susunan tempat duduk ialah mangsa disuruh menghadap Tertuduh. Kakak, ibu dan adik disuruh menghadap pintu dan seorang lagi pembantu disuruh melutut menghala keluar. Semasa berdoa kepala mangsa ditutup dengan satu benda sampai ke paras mata. Mangsa dan semua orang disuruh memejam mata dalam keadaan lampu terpasang.

Sedang masing-masing melakukan seperti yang diarahkan oleh Tertuduh, Tertuduh yang berada di depan mangsa telah menyentuh mata mangsa dengan jari sambil membaca doa. Mangsa terasa ada suatu benda yang menyentuh bibirnya semasa Tertuduh menyuruhnya membuka mulut. Mangsa menurut arahannya membuka mulut. Apabila mulut dibuka, mangsa terasa kemaluan tersentuh pada lidahnya.

Apabila begitu, mangsa dengan serta merta membuka mata dan cuba mengelak. Tetapi Tertuduh cuba lagi memasukkan kemaluannya kali kedua dan berjaya dielak. Apabila Tertuduh mencuba lagi sekali lagi, mangsa terus menjerit dan lari keluar. Apabila mendengar jeritan ini, kakak mangsa (SP3) berpusing ke arah adiknya itu dan nampak Tertuduh cepat-cepat memasukkan kemaluannya ke dalam seluar.

Mangsa terus membuat laporan polis seperti dalam laporan Pokok Assam No. 812/2001 (P2). Tertuduh ditangkap pada malam yang sama lebih kurang pukul 11.55 malam oleh SP2 Kpl. 98863 Vijay Kumar a/l Terlok Chand.

[7] After reading the appeal record and finding that the above facts were proven, and after considering the submissions of both parties, this court decided to enhance the imprisonment term of the accused from two years to six years of imprisonment taking effect from the date on which it was passed on the following grounds:

(a) The imprisonment term of two years is inappropriate to the proven facts, crime scene and pre-planned manners the offence committed by the accused.

The condemned act of the accused can never be accepted by any religion, customs or belief. Furthermore, it was committed by a person entrusted with great faith and hope like the accused being 'medium between men and God' (according to the victim and her family's belief) who was in charge at the religious institution.

The big hope and trust confided in the accused by the victim and her family to lead them in prayer had been abused by the accused in a place they considered sacred. This place should have been safe from such immoral conduct that

would definitely cause embarrassment and disgrace to the integrity of the victim's one whole family. Such a contemptible act has caused the victim to endure much shame and humiliation;

(b) The sentence of two years imprisonment is insufficient for a serious crime which the Legislature actually intends that the offenders be severely punished with a high maximum sentence in order to protect the public interest;

(c) Public interest seems not to have been regarded as important consideration when the accused is only punished with two years term of imprisonment for an offence with the prescribed maximum sentence of 20 years imprisonment;

(d) The sentence of two years imprisonment is not a clear signal to suggest that the offence committed by the accused is indeed a heinous crime. Hence, the short term of imprisonment is viewed as not illustrating the seriousness of the offence under s 377B incorporated by the Legislature in the Penal Code. This court is fully aware of the well established sentencing principles in the cases of *Public Prosecutor v Fam Kim Hock* [1957] MLJ 20; *Liow Chow & Anor v Public Prosecutor* [1939] MLJ 170; and *Public Prosecutor v Lim Guan Hock* [1949] MLJ 231;

(e) Though the offence committed by the accused is not as rampant as drug trafficking, rape, snatch-theft, armed robbery or 'merempit' and is not causing the victim to suffer the traumatic effect like rape victims and incest, nonetheless, this court is of the opinion that public at large who believe in good cause and hope for security, just like the victim's family would demand that they be protected from criminals like the accused, a person upon whom they put their trust. The victim's fright and her spontaneous act of running out from the temple should suffice to manifest her disappointment and trauma. The victim's high hope and trust as illustrated in this case is similar to that of put upon parents and for that matter grandfathers by the children and grandchildren who anticipate their protection of the former against the offence of incest and the sick who expected to be healed by medical practitioner. This court should have considered a deterrent sentence to deter potential offender emerging from this class of people who are highly entrusted in the society;

(f) In connection to this, the court should not be viewed as concluding that the sessions court judge had erred in her application of the sentencing principles when this court enhances the sentence he pronounced. In this context, this court is fully aware and had taken into account the principles spelt out by the Federal Court in the case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] MLJ 83;

(g) This court finds no reason but to agree with the considerations of the sessions court judge on the facts that this is the accused's first offence and the marital status of the accused in imposing the sentence, nonetheless the term of two years imprisonment is certainly inadequate bearing the facts of this case; and

(h) In a nutshell, grounds (a)–(f) of the prosecution's appeal are substantiated. Therefore, taking the public interest as paramount consideration without setting aside the accused's interest as elaborated in the grounds aforesaid, this court is of the view that the term six years imprisonment is the most reasonable and appropriate sentence with the offence proved in this case. With that, the prosecution's appeal is hereby allowed. Be that as it may, whatever aspect of public interest that has been considered in this case, this court believes that whipping sentence still ought not to be imposed on the accused for the offence that he has committed.

Appeal allowed.

Reported by Kohila Nesan